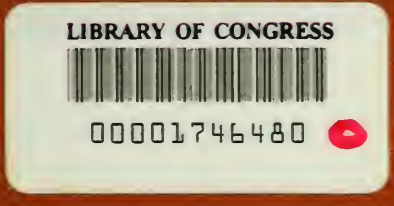

SPEECH

OF

HON. JAMES W. WALL, OF NEW JERSEY,

ON

THE INDEMNIFICATION BILL;

DELIVERED

IN THE SENATE OF THE UNITED STATES, MARCH 3, 1863.

WASHINGTON:
1863.

SPEECH.

The Senate having under consideration the report of the committee of conference on the disagreeing votes of the two Houses on the bill (H. R. No. 591) to indemnify the President and other persons for suspending the privilege of the writ of *habeas corpus* and acts done in pursuance thereof—

Mr. WALL said:

Mr. PRESIDENT: I look upon this bill as fraught in its consequences with more terrible mischief to the best interests of this country than any of the dangerous projects that have sprung, like Minerva, but without her wisdom, full armed, from the busy brain of the chairman of the Military Committee. It is more pregnant with evil for the Republic than was the belly of the Trojan horse to Ilium. And now is the time, here the place, "where the wild-fig trees join the walls of Troy," when all those who would defend the palladium of constitutional liberty must meet the foe and drive him back, if it is not already too late. Here, if we must perish, we should perish together. We must fight to the last, for if this bill once passes there is no Latium for us to fly to.

This bill clothes the President of the United States, with the aid of the conscription bill passed on Sunday morning, with the panoply of the vast powers and functions of a dictator. The dictator who in the hour of a nation's peril came forth from the Roman senate, with absolute will over the life, liberty, and property of the Roman citizen, never had any more power than this bill confers upon the President of the United States. When the decree for the appointment of a dictator went forth from the conscript fathers of Rome, they vailed the statues of Liberty that stood in every market-place, in every boarium, in every forum, and in every temple throughout the vast extent of the empire. The shrouded, silent forms of this goddess gave notice everywhere to the Roman citizen that his absolute rights were taken away. But under this bill, Mr. President, there will be no such notice to the citizen of this Republic. By this bill you place at the discretion of the President the grave power to suspend the great writ of right of the people of the entire country at his option. You actually confer upon him the functions of a legislator, the right by his own volition to suspend a law; a right which I hold under the Constitution belongs alone to Congress; and which it has no more right to delegate to him than a trustee would have a right to delegate trust a power. This bill is only an embodiment of that pestilential political heresy with which this war commenced—and to which I shall address myself presently—that the right to suspend the privilege of the writ of *habeas corpus* was an executive and not a legislative power—a political heresy boldly sustained in this Chamber by the Senator from New Jersey who preceded me, but who has now gone, to enjoy his reward for having unlearned the legal lessons that had been taught him, where, I may say, the Democracy cease from troubling, and the wearied politically are at rest—for it is a life estate. I shall take occasion before I conclude to allude to some of the points in his speech, for the purpose of refuting them, and placing my protest upon the record against the infamous doctrine it contains, and the gross insult that it offers to those great men who laid the foundations of this Republic, with a view to the public happiness, by securing to the citizen those absolute rights which such a doctrine as this overturns at a blow.

Let this bill pass, Mr. President, and it places the liberty of every citizen in the loyal States at

the will of the President of the United States, with no check, no control; and it reopens the iron-studded doors of the casemates in your bastiles, to be filled, as before, by men against whom no accusation has been lodged, and who seek in vain to meet their accusers face to face before the legal tribunals of the land. Again will the post offices, as they were before, become each like the lion's mouth of Venice, where the secret informer may lodge his lying accusation; and from a tribunal as inexorable as the far-famed Council of Ten shall come as swift and as sure the mandate that consigns him to some military dungeon of the Republic, which desecrates the names of those martyrs to liberty, it may be Fort Warren, it may be Fort La Fayette. This bill, if it passes, establishes in the President arbitrary power; and history informs us that arbitrary power is progressive, untiring, unresting. It never halts or looks backward. As one has eloquently said of it:

"Call it by what holy name you will, sanctify it by what pretexts or purposes of patriotism you may, under any flag, in any cause, anywhere and everywhere, it is the foe of human rights, and by the very law of its being is incapable of good. There is, there can be no life for liberty but in the supreme and absolute dominion of law. This lesson is written in letters of blood and fire all over the history of nations. It is the standing moral of the annals of republics since their records began. It is legible upon the marbles of the elder world; it echoes in the strife and revolutions of the new. Wherever men have thought great thoughts and died brave deaths for human progress, its everlasting truth has been proclaimed."

An encroachment upon the Constitution, striking arbitrarily at the personal liberty of every citizen in the land, is but one of the paths leading straight toward despotism. There are numerous others, but they all run parallel to this. Let the nation, or the nation's representatives, submit in silence and indifference to such a bold usurpation of power as I conceive is contained in this infamous bill, and from that moment the manly courage which is the defense, and the sleepless vigilance that is the price of liberty, is gone. Every one of these pathways lies open, inviting the tread of usurpation. Said the aged Selden in reply to the ministers of Charles I:

"The personal liberty of the subject is the life and the heart's blood of the commonwealth, and if the commonwealth bleed in that master vein, all the balm of Gilead is but in vain to preserve this our body-politic from ruin and destruction."

Said Algernon Sidney, England's noblest martyr:

"He who oppugns the liberty of the subject under the constitution of this realm, and in violation of it, not only overthrows his own, but is guilty of the most brutish of all follies."

These noble words were literally sprinkled, and so consecrated, by that noble martyr's blood. It was for their utterance he died, the noblest, proudest name upon the martyr roll. He was alike inflexible to king and protector—the champion of liberty against despotism—in the study, at the bar, in the prison, and upon the scaffold. To him the world owes those great and eloquent discourses, the first complete definition and exegesis of the true nature and duties of government, full of brave and noble sentiments, the well-stored armory from which the fathers of our Republic drew the strongest and the sharpest shafts they shot against the breast of despotism.

In view of the vast powers which the Congress of the United States propose to give to the President under the provisions of this bill, I would invite attention to the following sagacious words uttered by Lord Temple in the British Parliament at the commencement of the last century:

"Rashly and willfully to exercise a power clearly against law and the constitution is too great a boldness for this country *at any time*, and the suspending or dispensing power, that edged tool which has cut so deep, is the last that any monarch in his wits, in any emergency, would dare to handle in England. It is a rock that English history has warned against with awful beacon lights. Its exercise lost one prince his crown and head, and at last drove his family out of the realm. A minister or representative who is not afraid of the exercise of such an iniquitous power, is neither fit for sovereign or subject."

Strange and startling as the truth may appear, Mr. President, this suspending power of the absolute rights of the citizen which in peace or war was considered too hazardous to use, either by king, minister, or representative, has proved the easiest thing for republican America in this high noon of the nineteenth century. Nay, sir, more startling even than this, it has even been declared treason to question for one moment the right to its exercise. That power the use of which cost one prince his crown and head, and drove his family out of the realm, has been sported with, and is to be again, by the President of the United States, holding his office under a limited Constitution, and where the absolute rights of the citizen were supposed to have been placed far beyond the reach of the tyrant grasp of arbitrary power. Fortunately, for the time, an indignant people rose to vindicate their outraged rights, and struck terror into the hearts of their rulers. Pass this bill, and we shall have the same abnormal acts recommenced, and one by one the landmarks of the Constitution will be obliterated, the laws suspended, the personal liberty of the subject assailed, and provost marshals and marshals like the cowled "familiars" of the Inquisition dogging the footsteps of the citizen and tracking him to his doom.

The time was once, Mr. President, in this Re-

public, we might say of Americans, as was said to King John by the archbishop—

"Let every Briton, as his mind be free,
His person safe, his property secure,
His house as sacred as the fane of heaven,
Watching unseen his ever open door,
Watching the realm, the spirit of the laws;
His fate determined by the rules of right,
No hand invisible to write his doom,
No demon starting at the midnight hour
To draw his curtain, or to drag him down
To mansions of despair."

* * * * * * *

"Inviolable preserve
The sacred shield that covers all the land—
The heaven-confessed palladium of the isle—
To Britain's sons, the judgment of their peers,
On these great pillars: freedom of the mind,
Freedom of speech, and freedom of the pen,
Forever changing, yet forever sure,
The base of Britain rests."

The time was, sir, when this noble eulogy, pronounced by Shakspeare on the British constitution, might be more aptly applied to our own. The great American charter of our freedom had more than confirmed to us these laws of the Confessor, and our people had given them as free, as full, and as sovereign a consent as was ever given by John to the bishops and the barons of Runnymede. The mind of the citizen was free, his person was safe, his property secure, his house his castle, the spirit of the laws his body-guard and his house-guard. Would he propagate truth? Truth was free to combat error. Would he propagate error? Error itself might stalk abroad and do her mischief, and make night itself grow darker, provided truth was left free to follow, however slowly, with her torches to light up the wreck.

But who is it that takes a retrospective glance over the stirring, awful history of the last two years, but feels how the fine gold has grown dim beneath the tarnishing touch of the hand of despotic power? Those great, absolute rights of the citizen, which were intended to be beyond the reach of arbitrary influence, the right of personal liberty, of property, of free speech and a free press, rudely and ruthlessly violated. Of these absolute rights, during what was not inaptly called the reign of terror, there was not one that was not trampled upon by the Executive or his subordinates; and what was worse than all, every assault that was made upon them was applauded to the echo by jurists, lawyers, divines, and contract-hunting renegade Democrats, whose cowardly hearts either ran away with their better judgments, or who really did not understand the very first principles of the Constitution under which they lived. Men were arrested and papers seized without warrant or oath of probable cause; prisoners were held without presentment or indictment, denied a speedy and public trial, nay, refused a trial altogether, carried away by force from the State or district where their offense must have been committed, and incarcerated for months in the bastiles of the Government, and then set free without being even informed of the nature and cause of the accusation against them. Every constitutional outpost was driven in, and every personal guarantee of the citizen brushed away by the Executive as easily as cobwebs by the hands of a giant. And this by a Government professing it was fighting for the Union, the Constitution, and the enforcement of the laws; for those at the outset of this war were the proud words that glittered upon your advancing standards. Doctrines were preached in high places directly at war with all the fundamental principles of free government. The central power, under the bald pretense of preserving the Government, assumed a new and fearful energy, until men went about with "bated breath and whispering humbleness," not knowing where the next blow was to fall, or who was the next friend that was to be stricken down at their sides. Of these times I may exclaim, "*quorum pars fui.*"

It was my lot to have felt the grasp of arbitrary power, and within the damp, grated casemates of one of the bastiles of the Government, to have learned how helpless a thing is the citizen who is deprived of those absolute rights, which, if they do not exist in your Constitution, your Constitution is a miserable delusion and a snare. Having been arrested without cause shown, I was liberated in the same way, after enduring personal indignities, which, to a high-spirited man, eat like iron into the soul. And from the hour of my liberation up to this moment, where I stand upon this floor, the representative of a sovereign State, I have been unable to learn what those charges are. I have in vain demanded of the proper Department what were the charges against me, claiming the freeman's constitutional privilege "to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against me." Great heavens! Mr. President, is it possible that such things can be, under a Constitution whose boast it has been that it was for the protection of the inalienable rights of men against oppression? If this boast has been in vain, then, sir, that Constitution has but a name to live, an outer seeming to beguile and deceive, a Sodom apple, a hectic flush—

"Painting the cheek upon which it preys."

The liberty I claim, and those who act with me,

under that Constitution is not the liberty of licentiousness; it is the liberty united with law; liberty sustained by law; and that kind of liberty we have always supposed was guarantied to every man, rich or poor, high or low, proud or humble, under all exigencies, whether in peace or war, and whether that war is foreign, or the State is in the fearful throes of civil strife. This is my loyalty and that of my political friends on this floor—the allegiance, the devotion to organic laws. I know no other loyalty, and I will not bow myself at the shrine of any other. In this Republic, its Constitution declares:

"No citizen shall be deprived of his life, liberty, or property, without due process of law."

He may be made to part with all three by the power of the State; but that power must look well to it, sir, that in its exercise it does not transcend the limits in which it is appointed it to move. If it does, it becomes despotic; and then, among men who know their rights, and knowing dare maintain, resistance follows as naturally as light succeeds to darkness. If by a simple mandate, nay, by the lightning flash over the telegraph wire, of any Cabinet officer, in States where the people are loyal, and where the courts of law are open, you or I may be torn from our homes and consigned for an indefinite time to the gloomy walls of a Government fortress, the same mandate or dispatch, only altered in its phraseology, may consign us immediately to the hands of the executioner, or deprive us of our properties, confiscating them to the State. If not, why not? The right to have our lives secure against interference *without due process of law* is equally guarantied in the same clause which protects our liberty and our property. These privileges can trace their lineage back to the grassy lawns of Runnymede, where they were born more than six hundred years ago. They were extorted then and there by the rebellious barons, and uttered in glowing language that has come down to us from the ages long ago, and is still sounding in our ears as the sweetest note that ever came from the silver clarion of freedom. Listen, Senators, to the music, strong and sweet as it sounded in the solemn midnight centuries ago:

"No freeman shall be seized or imprisoned, or disseized, or outlawed, or in any way destroyed; nor will we go upon him or send upon him, except by the judgment of his peers, or the law of the land."

Our fathers caught the inspiring strain, and it was prolonged in that sonorous sentence in our own once glorious Constitution: "no person shall be deprived of life, liberty, or property, without due process of law;" "due process of law," the law which hears before it condemns, and punishes only after conviction.

Mr. President, every arrest made during the reign of terror by the President or his subordinates was in direct antagonism to this fundamental principle of our Constitution, violative of its solemn sanctions, and, because abnormal, revolutionary; for it encouraged, nay, sanctified resistance. I remember well, sir, the excitement in Europe when the King of Naples, the infamous Bomba, seized a few young men of the first families by military force, who were engaged in plotting against his throne, and immured them in those horrid dungeons, blasted out of a rock, in that State fortress which, like La Fayette in the bay of New York, is the only dark and hateful thing upon the bright waters of the beautiful bay of Naples. The military guard, without warning, without accusation, just as was done with the members of the Maryland Legislature and the Baltimore prisoners, surrounded their houses at the midnight hour, and they were torn suddenly from the luxurious comforts of their splendid homes, to be immured in those awful prison-houses, wet with "the accursed dew of dungeon damp," sunk far below the surface of the waters of the Neapolitan bay. They were suspected of treasonable practices. Their offense had that extent, no more. A cry of horror went up from almost every nation in Europe, and from the then untrammeled press of the American Republic. England remonstrated through the manly, eloqnent appeal of her indignant Gladstone. France raised her voice in denunciation of the outrage; while republican America shuddered as she thanked God "that no such outrage could ever stain her national escutcheon." We professed to know then what liberty was worth; and as we sent cheering words to those brave spirits engaged in the work of Italian liberation, we told those rebellious children of the sun, "it is worth all your struggles, every sacrifice, and oceans of blood." The vengeance of an oppressed people soon rose to vindicate the race and punish the oppressor. In vain were her dungeons filled and her hearthstones desolate. The bright dream of "Italia Libera" remained, the scattered manna upon which the concealed enthusiasm of a whole nation fed itself, and to-day Naples is redeemed, disinthralled. The Bourbon's family is in exile, and the people's king rules over the warm hearts that welcomed him to the throne. Vengeance is certain, sooner or later, to overtake the oppressor; and the Nemesis of retribution,

with the flaming sword, follows swiftly after the tyrant.

But the objection of the danger to the public liberty and safety is not the only objection to this bill. It is by its own title an indemnity bill, and proposes to shelter behind the protecting ægis of its strange legislation the unlawful acts of the President and his subordinates. In other words, it proposes to legalize an illegality. It is the legislative power sheltering the executive branch of the Government from the consequences of its abnormal, unconstitutional acts. You might as well attempt by legislation to screen the judiciary from the consequences of malfeasance in office. If one department can thus protect the other, I ask, what becomes of official responsibility and the obligations of official oaths?

I hold, sir, that the remedy is provided by the Constitution, article second, section four, in case the President is guilty of any official misconduct. By that article he is made liable to impeachment for treason, bribery, and other high crimes and misdemeanors. The President may violate his official duty in three ways: 1. By refusing to execute the laws and treaties of the United States. 2. By usurping a power not confided to him by the Constitution, although in some cases this may amount to treason. 3. By an arbitrary and corrupt use of an authority lawful in itself, but which was intended to be exercised with a single view to the public good, to answer the purposes of a selfish intrigue. In England the king is not constitutionally answerable for any of his official conduct; but it is presumed that he always acts by the advice of his ministers, and they are held personally responsible for all political measures adopted during their administration. Some of them have suffered capitally for such alleged misconduct. It is on this account, in part, that ministers send in their resignation as soon as they find that the majority of Parliament is against them. But here it is different. The President is answerable for his own official conduct, and is liable to impeachment for any default in the discharge of his sworn duty. To say that any coördinate branch of this Government could shield him from the consequences of such acts would be an absurdity, and tend to annihilate the whole system upon which this Government was founded.

Again, this bill, if I understand it, not only proposes to shelter the President from the consequences of illegal acts—for the provisions of the bill really amount to this, if fully carried out—but to protect and shelter those of his subordinates whom he may have commanded to perform unconstitutional or illegal acts. Now, Mr. President, if there is one fundamental principle of law better established than any other, it is this: that, within the limits of their respective powers, all officers, from the President of the United States downwards, ought to be submitted to and obeyed; *but if they should overstep the limits of their official authority*, if they should usurp powers not delegated to them by the Constitution, or by some law made in pursuance of it, they would cease to be under the protection of their offices, and would be recognized merely as private citizens for any act of injustice or oppression they might commit, and liable to a civil or criminal prosecution in the same manner as a private citizen, with this distinction: that if the wrong-doer has availed himself of his official character, or of the opportunities which his office affords him, to commit acts of injustice or oppression, it will be considered as a great aggravation of his guilt in a criminal prosecution, and will be a ground for a jury to find exemplary damages in a civil action. This is the principle that runs through all the cases; and all the indemnity bills that Congress might pass from now to the crack of doom would not disturb the force and efficacy of that principle, in the mind of a high-minded, intelligent jurist, who had a professional reputation to guard, however it might affect those imitators of the Crawleys and Vernons of the first Charles's day, who have crawled to judicial positions by base servility and disgusting obsequiousness, and who might be willing to exclaim, as they did in the ship-money case—

"That the king, *pro bono publico*, may charge his subjects both in their properties and persons for the safety and defense of the kingdom, notwithstanding any act of Parliament, and may even dispense with law in case of necessity."

The attempt of the President to shelter his subordinates from responsibility upon the *sic volo, sic jubeo* principle, is only another phase of the delusion under which men's minds have been laboring. He certainly ought to be lawyer enough to know that the Supreme Court has decided in 2 Cranch, 119—

"That if the President should mistake the construction of an act of Congress or of the Constitution, and, in consequence of it, should give instructions not warranted by the act or the Constitution, any aggrieved party might recover damages against the officer acting under such instructions, *which, though given by the President*, would furnish no justification or excuse."

I admit that in general, when a particular duty devolves upon the President, but the means to be used in discharge of it are not pointed out, he may adopt those which are most proper for that purpose, *provided they are not repugnant to the Con-*

stitution or prohibited by acts of Congress. Thus, in time of war, he has the right to use all the customary means to carry it into effect, but he cannot override the Constitution in doing it. It would not, perhaps, be a sufficient foundation for an impeachment if the President should make use of the discretion intrusted to him by the Constitution or laws of the United States imprudently and injudiciously; for, in any such case, the people must be content with the honest exercise of such ability as they see fit to elevate to this high office. But they have a right to expect, nay, demand, integrity and fair purposes and intentions, and that the civil rights guarantied to them by their fathers shall be scrupulously preserved. Many very honest citizens think that in a time of war or rebellion the President becomes by some political legerdemain invested with all the functions of a dictator, and holds the lives, liberties, and properties of the citizen in his all-powerful grasp. Within the sphere of his constitutional duties the President may justly claim the support of all good citizens; but when he transcends the powers conferred on him by the Constitution to strike down the liberties of the subject, he must expect, nay, he invites opposition. Some Senators, on the other side of this Chamber, seem to think that the test of loyalty is to be found in a blind adhesion to the President and his administration; but I would say to them that my loyalty is akin to that so well described in those lines of Cowper:

> "We too are friends to loyalty: we love
> The king who loves the law, respects its bounds,
> And reigns content within them."

As to the responsibility of high officials, there are very many in the community who labor under the erroneous idea that the office protects the transgressor. The legal authorities are all the other way. Both the authorities in this country and England point but one way upon this subject. In England the responsibility of an official who usurps power has never been questioned, and the loftiest officials have been held to a just retribution for their wrongs, and governors admitted to be viceroys in effect have been made to answer for their assumptions of power, not only in their estates, but with their lives. What said Chief Justice Pratt, afterwards Lord Camden, in overruling a motion for a new trial made by the defendant in an action of trespass for arresting the plaintiff on a warrant from Lord Halifax, the Secretary of State?

> "If the jury had been confined by their oath to consider the mere personal injury only, perhaps twenty pounds damages would have been sufficient; but the small injury done the plaintiff and the lowness of his station did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them on the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom by insisting upon the legality of general warrants in a tyrannical and severe manner. These are the ideas which struck the jury and induced them to give these heavy damages. I think they have done right. To enter a man's house and drag him from thence by means of an unconstitutional warrant is worse than the Spanish Inquisition—a law under which no Englishman would wish to live an hour. It was a most daring public attack made upon the liberty of the subject."

Pass this bill, Mr. President, and you not only confer upon the President an authority which I conceive you have no power to confer, but you also, by your legislation, give to him and his subordinates assurance that they may do the like again, and escape the punishment that should always be meted out to violations of constitutional law. It does really seem to me, sir, when I listen to Senators on the other side defending acts which they admit to be abnormal, and insisting that the public necessities demand the sacrifice, as if those gentlemen were trying to persuade us that the best way to preserve our liberties would be to give them up, and that the surest mode of securing a government of law would be to suffer arbitrary power to destroy it. "The dearest interests of this country," said Junius—and I adopt his nervous language—"are its laws and its constitution. Against every attack upon these, there will, I hope, be always found among us the firmest spirit of resistance, superior to the united efforts of faction and ambition."

Mr. President, this bill, in leaving it discretionary with the President at any time and place and at his own option to suspend the privilege of this great writ, in fact gives countenance and support to that political heresy that the right to suspend the writ exists in the President of the United States, and not in Congress. This bill does not suspend the privilege of the writ; it leaves it for the President to do, whenever he thinks the public exigency demands it. It certainly could never have been the intention of the framers of the Constitution to authorize the Executive to suspend the privileges of the writ at his option. If this was a novel question, that had never been mooted before, one might well understand how there might possibly be some variance in men's opinions. But when it is considered that in 1807 it had a most thorough and exhausting discussion in Congress; that it had been before the judicial tribunals of the country, and frequently the subject of discussion by commentators upon the Constitution and by statesmen; that up to the year 1861 there was an entire

unanimity of opinion as to where the power to suspend the privileges of this writ rested, namely, in the legislative department of the Government, we can only be astonished that there should be any difference of opinion about it. But now we are told that the peculiar legal optics of modern statesmen and lawyers have been enabled to discover that which the keen, searching, patriotic vision of the men who framed the Constitution failed to see. That which the luminous perception of Marshall, Kent, Story, and Curtis could not discover, has been reserved for the keener optics of Bates and Lincoln.

It appears to me, Mr. President, that the true spirit of the *habeas corpus* clause in the Constitution is as clear as sunlight to any man who will study the debates both at the time of the formation of the Constitution and when it was submitted to the States for their adoption. There were members in the Convention who were in favor of making the enjoyment of the privilege of the writ absolute at all times, in the same manner that it was intended the liberty of the press, of speech, and of religion should be enjoyed. There were others again who favored limitations of time and suspension on certain conditions. The clause itself, therefore, appears to me to have been a mean between extremes of opinion, and was intended to reconcile conflicting views. There is very little light thrown upon the subject by the discussion in the Convention; but the peculiar position occupied by the clause in the Constitution is significant, and if not conclusive is certainly suggestive of the particular department upon which it was intended to confer this power. But if from the proceedings of the Convention and the debates in that body nothing satisfactory can be gleaned upon the subject, much may be learned from the after debates in the State conventions. We shall give but one reference upon this subject, although we might quote many others. Governor Randolph, of Virginia, who had much to do with the fashioning of our Constitution, in a speech in reply to Patrick Henry in the Virginia convention, who had assailed the Constitution because it conferred the power to suspend the privilege of the writ of *habeas corpus* upon the Legislature, said:

"I contend, Mr. President, that the *habeas corpus* in this Constitution is at least on as good and secure a footing as in England. In that country its suspension depends upon the Legislature and not upon the Crown. That great writ of right can only be suspended here in the same way, by the Legislature in cases of extreme peril, never by the Executive."

Our fathers very justly conceived that in dangerous, critical times like the present, the people would be willing to part with a portion of their freedom temporarily; but the warning voice of history had clearly indicated to them that such loss to be endurable must rest in the discretion of their representatives, and not in the breast of one man. They had studied the causes of revolutionary action too closely not to know that this one-man power would not be tolerated for a moment except by those who, to use the language of Thomas Jefferson, were born with saddles on their backs and bits in their mouths, that tyrants might ride and spur them by the grace of God.

The men of our early day, Mr. President, had a perfect horror of conferring arbitrary power upon a single individual. For them arbitrary power in whatever shape it appeared, whether under the vail of legitimacy, skulking in the disguise of State necessity, or presenting the shameless front of usurpation, was the sure object of their detestation and hostility. They might give this tremendous power to suspend the privileges of this writ to the law-making authority, because the act of suspension was a legislative act, and because in this way due notice would be given to the citizen when the exigency arrived; but to leave it optional in the discretion of one man, however exalted or honest he might be, to strike down the liberty of the citizen without warning, as has been done, *this* these haters of tyranny would never have consented to. They believed, in the language of Burke, in his speech on the impeachment of Hastings:

"It is a contradiction in terms, it is blasphemy in religion, it is wickedness in politics to say that any one man in a free State should possess arbitrary power over the liberty of the citizen, either in peace or war."

It was unquestionably the grand aim of the framers of the Constitution of the United States to establish a Government which would not only be nominally free, but substantially so. It was with this view they reared those barriers to political maladministration which had been unfolded to their observation, and were the gathered wisdom of a thousand years. They knew that the safety of the people was the supreme law, but they believed the Constitution. They believed that above that Constitution there was no law; outside of it there was no security.

The Senator from New Jersey who preceded me on this floor, in an elaborate speech that he delivered while here, stated that the language of the *habeas corpus* clause in our Constitution was new and peculiar; and that in discussing where

this power of suspension resided, we must set aside the analogies of English history altogether. What he meant to convey by this idea I am at a loss to know. He must have been strangely oblivious to English precedents, where the use of this clause may be found almost in the very words used by Mr. Pinckney himself, who doubtless borrowed them from thence. He is no less unfortunate when he attempts to show that the analogies of English history must be excluded, and have no bearing upon the point in issue. Any school-boy, with but a smattering of English history, could have told him better. All his ingenuity will fail to convince the people of New Jersey that their fathers had no reference to and no thought of those eventful centuries of strife between the king and the people, amid whose fierce throes this great privilege was born. Why, there never was a time in English constitutional history when the power of suspending this writ did not exist somewhere. There can be no manner of doubt on this point. The controversy always was, where does it reside, in the Parliament or in the Crown? The formal contest for this discretion to imprison and detain without trial marked the change in the English Government from monarchy to aristocracy, and thence to democracy, as this power over the *lex terræ* has resided in one or other of these departments of the Government from the Conquest to this time. The personal liberty of the subject was a natural, inherent right, which could not be surrendered or forfeited unless by the commission of some great and startling crime. This was a doctrine coeval with the first rudiments of the English constitution, and handed down from Anglo-Saxon ancestry, notwithstanding their Danish struggles; asserted afterwards and confirmed by the Conqueror himself; and though sometimes much impaired by the ferocity of the times and the occasional despotism of jealous, exacting princes, yet established on the firmest basis by the provisions of *Magna Charta* and a long succession of statutes on through the grand struggle over the Petition of Right, until it culminated in the great *habeas corpus* act of Charles II, justly styled a second *Magna Charta*.

It would require something more than Senator Field's dictum to make good such a false and forced position as this. The history of England for centuries is against him; the sentiments of all her historians are antagonistic to his position; and lastly, the declarations of the men who assisted in framing our Constitution stand in his way. During the struggle between the monarch and the Commons in 1628, in reference to a royal grant of a declaration of rights, Charles I took the very ground sustained by Mr. Field and the Senators on the other side of the Chamber:

"That there might be times of rebellion, times of danger to the State, when the safety of the commonwealth and the necessities of the hour might demand the unrestricted exercise of the royal prerogative, and, for the time being, the liberty of the subject must give way."

This, too, was the obsequious language of the House of Lords who, at that time, stood by the king against the freedom-loving House of Commons. Let us glance for a moment at the history of those times; carry our minds back to the age of those stern, unyielding men who, in spite of the terrors of the royal frown, then and there established a barrier against the encroachment of the king's prerogative. Let us listen to their very words, to learn if we cannot catch, from those who resisted usurpation then, some traces of that spirit which, more than a century after, on this side of the Atlantic, manifested itself in the bearing and actions of the men of 1787. Let us see, sir, whether, as Mr. Field says, the analogies of English history can be set aside in considering that clause in our Constitution forming, if rightly respected, the great bulwark of the freedom of the citizen. Said Sergeant Ashley, in that memorable debate constituting a landmark in history:

"Divine truth informs us that kings have their power from God, and are representative gods; the Psalmist calling them the children of the Most High. Can we conceive, then, that so exalted a person as the king hath so far committed the power of the sword to inferior magistrates, that he hath not reserved so much supreme power as to commit an offender to prison without showing cause, and without warrant? I contend, therefore, that for offenses against the State, in times of rebellion or in critical emergencies, the king or his council hath lawful power to punish by imprisonment without showing cause. The martial law, though not to be exercised in times of peace, when recourse may be had to the king's courts, yet in times of invasion or other times of hostility, when an army royal is in the field, and offenses are committed requiring speedy resolution, and cannot expect the solemnities of legal trial, then such imprisonment, execution, or other justice done by the law-martial is warranted by the king."

The language used by Mr. Field, the Attorney General of the United States, and others, is but the echo of the degrading servility and baseness of this celebrated advocate of the divine right of kings. We do not know whether a grateful master ever conferred upon him a judgeship for his services; but we have no doubt he obtained a substantial reward.

But even such crouching at the king's footstool by the obsequious, politic sergeant, was more than even the Lord President of the committee of the House of Lords could stomach, for he told the Commons:

"That while at this free conference liberty was given

by the Lords to the king's counsel to speak what he thought fit for his Majesty's service, yet Mr. Sergeant Ashley had no authority from them to speak such servile words as he had done."

And how did the manly, noble spirits who at that early day had the courage to resist the claim of king and counsel to arrest and imprison the subject without cause or accusation, answer?

Said Sir Edward Coke, with his usual quaintness and directness:

"As the center of the greatest circle is but a little speck, so the weightiest matter ever lies in a little room. It was a wonder for him to hear that the liberty of the subject could be thought incompatible with the regality of the king. In one point the king's attorney had come close to him. He was glad he had awaked him. Because a king is trusted with greater things, such as war, money, pardons, &c., therefore he should at some times have absolute power over the liberty of the subject. We emphatically deny his conclusion; for the liberty of the subject is far more than all these; it is *maximum omnium humanorum bonorum*—the very sovereign of all human blessings. No citizen can thus hold his liberties as tenant at will to the sovereign. Mr. Speaker, there is no such a tenure to be found in all Littleton."

"What," said the king's counsel, "can you arrest none without process or original writ? The suspected fellows may run away." To whom Coke answered:

"The law gives process and indictment, and therefore gives all the means that any emergency can demand."

Said William Mason:

"It hath been solemnly and clearly resolved by the House that the commitment of a freeman, without expressing the cause of commitment, is against the law. If you give this power by reason of the necessities of the State, you will spring a leak which may sink all our liberties, and open a gap through which *Magna Charta* and the rest of the statutes may issue out and vanish. We must never relinquish to the Crown this right to interfere with our liberties."

In a subsequent debate upon the same subject, Sir Edward Coke said:

"I know that prerogative is part of the law, but sovereign power is no parliamentary word. Take we heed what we yield unto. *Magna Charta* is such a fellow that he will have no sovereign."

These were the sentiments of the men who wrested the Petition of Right from the first Charles, and compelled him to say, let right be done, as is desired. The object of these bold men was the preservation of personal liberty, in conformity to the express language of *Magna Charta*—

"That no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or the law of the land."

Now, sir, the privilege of the writ of *habeas corpus* at that time existed at common law. It was the remedy for such as were unjustly imprisoned to obtain their liberties. Many abuses, however, having been introduced in the mode of granting it, other statutes were passed. Early in the reign of the first Charles, the courts, relying on some pretended precedents, determined that they could not, upon the *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This, sir, drew on the parliamentary inquiry which resulted in the Petition of Right, to which reference has just been made. The statute passed in conformity with that petition enacts "that no freeman shall hereafter be so imprisoned or detained." But in the following year, Selden and others were committed by order of the lords in council, pursuant to his Majesty's command, under a general charge of notable contempts and stirring up seditions against the king and Government. This gave rise to great excitement in the public mind, and to another statute in the sixteenth year of the same king. But the *habeas corpus* act of the next reign, originating in the oppression of an obscure individual, was considered as another *Magna Charta* by Englishmen. Thus, sir, you will note this significant fact, that flagrant abuse of power by the Crown or its ministers was always productive of a popular struggle, a struggle that proclaims either that the exercise of such power was contrary to law, or, if legal, restrains it for the future. In speaking of the great *habeas corpus* act passed in the reign of Charles II, Sir William Blackstone, writing several years before our Constitution was formed, and whose invaluable work had been studied thoroughly by the men who framed that Constitution, says:

"This writ is of great importance to the public; for if it were once left to the power of any, even the highest magistrate, to imprison arbitrarily whenever he or his officers thought proper, then there would soon be an end of all other rights and immunities. Some have thought that unjust attacks even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the liberty of the subject. To bereave a man of life by violence, to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as would at once convey the alarm of tyranny throughout the kingdom; but confinement of the person by secretly hurrying him to jail, where his sufferings are unknown and forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary power; and yet when the State is in imminent danger, even this is sometimes a necessary measure; but the happiness of our constitution is that it is not left to the executive power when the danger of the State is so great as to render this measure expedient, for it is the Parliament only can authorize, *when it sees proper*, the Crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reasons therefor."

And yet, with this array of historical facts staring him in the face, with all these English analogies encouraging them to imitate, if not improve upon, the noble lessons they should have taught them, the late Senator from New Jersey and other apologists for executive usurpation endeavor to convince their readers and hearers that these proud incidents in history had nothing to do with originating this *habeas corpus* clause in our Constitution.

No, no, Mr. President, the men of our constitutional Convention were familiar with the history of the civil polity of the world. But more thoroughly had they studied the contest that had been going on for centuries in the mother country between the Crown and the people. Our fathers had been protestants against prerogative and its usurpations. They had felt the weight of its iron hand rest heavy on their loins, and they determined to throw it off. They knew how the flood of usurpation had attempted to overwhelm their fathers, and they placed this *habeas corpus* clause in the Constitution of the new Government they were framing that it might stand there for all time as the great breakwater against the efforts of arbitrary power.

In the argument of my predecessor, Mr. President, I find he asserts "that when the *habeas cor-*

pus clause was inserted in the Constitution the United States had no writ of *habeas corpus*." He lays down this self-evident proposition as though it was some startling truth. It is true that at this time the United States had no writ of *habeas corpus*, because there was no such Government as the United States. But if by this he meant to convey the idea that the colonial governments did not recognize the existence of the writ, or that the States did not, I take issue with him. The old constitution of his own State, adopted two days before the Declaration of Independence, and a dozen years before the Constitution, contains this clause:

"The common law of England, as well as so much of the statute laws as have been heretofore practiced in this colony, shall remain in force until they shall be altered by a future law of the Legislature."

And most of the State constitutions adopted after the Declaration contain similar clauses.

But Mr. Field caps the climax of folly and presumption when he declares that all experience teaches that the only safe depositary of this power to suspend the privilege of the great writ is the Executive which the Constitution has made for us, standing upon the only basis of the Constitution, with no other support than the integrity and patriotism of the man who has been elected to it by the people. Heaven preserve us if this be so! We have seen judges torn from the very seat of judgment by this Executive. We have seen the absolute rights of the citizen made a delusion and a mockery of, and the whole land startled by usurpation after usurpation, directed, controlled, and justified by this very Executive.

The late Senator from New Jersey appears in his very elaborate speech to have a very strange mode of deriving the power in the President to suspend this writ, from the peculiar phraseology of the two sentences:

"All executive power shall be vested in the President of the United States; and all legislative power *herein granted* shall be vested in a Congress of the United States."

To the first clause he gives a general construction; to the last a special and limited, insisting that while Congress is confined by the terms of the grant specially to the exercise of only such powers as are enumerated, the executive power is beyond and above the Constitution; or, in other words, the President neither in peace or war has any limits set to his authority. His will must be the law, and his sworn duty is to define what is necessary and proper, while the duty of the people over whom he sways the scepter is to obey. This is certainly the fair interpretation to be given to the conclusions of Mr. Field's singular logic:

"If you give the powers to Congress, they should be specially named in the grant; but not so with the Executive, *inasmuch as the power, from its very nature, is an executive power.*"

In other words, in plainer English, the people's representatives, in the exercise of their powers, are confined strictly to the words of the grant; whereas the Executive takes any and all power by implication. Well, surely this is a novel mode of interpretation, and an interpretation which I hardly think the good people of New Jersey would be willing to adopt. It is in accordance, however, with the base servility of the times, and most certainly entitles its author to a place on the United States bench, where he can elaborate more fully this peculiar dogma, and, if necessary, aid the embodiment of the war power at the other end of the avenue in carrying out and consummating his peculiar edicts. We had always supposed that "the short term for which the President was elected, and the narrow limits to which his power was confined, manifested the jealousy and apprehension of future danger which the framers of the Constitution felt in relation to that department of the Government." At least so once said Chief Justice Marshall. But a greater than Marshall is here in the person and theories of the late Senator from New Jersey. He has seen a marvelous light, which certainly was not vouchsafed to the eyes of the men who laid the foundations of this Government, and who certainly, if we are not presuming, understood the true theory and system of our Government much better than Mr. Field.

Mr. Field appears really to me, throughout the whole course of his speech and his singular positions, to have presented us with a very good imitation of the Quack in Moliere's play of "The Sick Man in Spite of Himself." Geronte in that play, in amazement, says to the Quack:

"My dear doctor, you reason well, but there is one thing that staggers me in your lucid explanations. I always thought, till now, that the heart was on the left side and the liver on the right.

"*Quack.* Ay, sir, so they were formerly, *but we have changed all that.* The college proceeds on an entirely new method.

"*Geronte.* I ask pardon, sir.

"*Quack.* Not at all. Oh, there is no harm done. You are not obliged to know as much as we do."

It may be that this is the case with the unenlightened people of New Jersey. They are not by any means obliged to know as much as Mr. Field; and I fervently trust that they never may, and will never consent to indorse and subscribe to any of the teachings of that school. If they do, their liberties are gone.

I turn from such an atrocious sentiment to the sentiments of Daniel Webster, who understood so fully where existed the limits within which executive power could move, and upon whose well-defined lines were written the warning words—thus far shalt thou go and no further. In his speech on Jackson's protest, he said:

"Who is he that belies the blood and libels the fame of his ancestry by declaring that the security for freedom rests in executive authority; who is he that invokes the executive power to come to the protection of liberty; who is he that charges them with the insanity and recklessness of putting the lamb beneath the lion's paw? No, sir; no, sir. Our security both in war and in peace is in our watchfulness of executive power. Sir, I will never trust executive power to keep the vigils of liberty."

These are right royal words, and I would have them written upon the walls of all the private and public seminaries of the land, that our youths might be taught early to fear the advance of arbitrary power. I would have them written above the altars of the churches, that the priests and their congregations might learn what lawful authority means, of which they prate so much and know so little. I would have them engraved upon the door-posts of these Houses of Congress, that the representatives of the States and the people might be taught in what way the rights and liberties of this people

are to be guarded from encroachment. Mr. President, when we contrast the Argus-like vigilance of such men as Henry, Martin, Barbour, of the revolutionary era, and contrast their indignant protests against executive encroachment and their jealousy of executive power with the thoughtless indifference and wretched subserviency of men who profess to be statesmen and patriots, we may well stand aghast at the fearful degeneracy of the times.

Can it be possible that these disinterested patriots of our early day were mistaken, and that the men of our day, whose chief patriotism seems to consist in supporting themselves out of the coffers of a straitened Treasury, could thus strangely discover the true theory of this Government? Our modern political philosophers would inculcate that when the Government is in a hand-to-hand conflict with revolted States, we must put all confidence in the executive head of this nation; nay, that we must permit him to execute power, even if it savors of despotism, on the jesuitical principle that the end justifies the means. Now, on the contrary, Mr. President, I hold that it is at just such times as these when the mind of the true patriot should be most distrustful, when his eye should be the most watchful, and when, with the armed force surrounding the Executive, he should be the more suspicious of the authority that controls it. But when, instead of confining the exercise of power within the well-defined lines of the Constitution, he finds it breaking down all the guards and fences that surround him, and invading those sacred precincts where the liberty of person, of speech, and of thought were supposed to be guarded with more than Argus-like vigilance, the true patriot should arraign such despotic attempt, although all the terrors of imprisonment, nay, of death itself, should surround him.

It is a libel upon the spirit of our forefathers, it is a libel upon the men who framed our Constitution, to suppose that any such authority can exist in the Federal head of this Government. In the midst of the gloom of the present, with the eye of faith methinks I can see around us and above us some faint harbingers of hope for the future. As Columbus sailed toward that new world he gave to Castile and to Leon, while mutiny was in the vessel, and around him the dreary waste of waters murmuring only despair, we are told that flowers and carved woods came floating around his vessel, while resting on his mastheads were birds of the most gorgeous plumage. So to us, sir, in the midst of the gloom of the present, come here and there these harbingers of the firmer land to which we are sailing. God hasten our coming, that we may once again, that we may once more plant our feet upon its firm foundations, the land of constitutional freedom, the hope of the world.